

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NO SUMMONS ISSUED

MARK WILLIAM LANE,

Case No

Plaintiff

against

CV 13-2078

THE DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
NATIONAL ARCHIVES AND RECORDS
AGENCY and CENTRAL INTELLIGENCE
AGENCY, THE OFFICE OF PROFESSIONAL
RESPONSIBILITY, FEDERAL COMMUNICATION
COMMISSION, NATIONAL SECURITY AGENCY,
DEFENSE ADVANCED RESEARCH PROJECTS
AGENCY, DEPARTMENT OF ENERGY, THE
OFFICE OF THE PRESIDENT OF THE
UNITED STATES,

COMPLAINT

KUNTZ, J.

Defendants

2013 APR -9 PM 2:43

FILED
CLERK

1. This court has jurisdiction of the action under the Freedom of Information and Privacy Act (a)(4)(B). 5 USCA Section 552.
2. Jurisdiction is proper under 552 (a)(4)(B) because Mark William Lane ("Plaintiff") maintains a residence in Staten Island, New York.
3. Venue is proper under Federal Rules of Civil Procedure because Plaintiff's residence is located in the Eastern District of New York.

PARTIES

4. Plaintiff is a private citizen living in Staten Island, New York.
5. Plaintiff believes and alleges, that defendant Federal Bureau

Archives dated October 4, 2010 related to the document with regard to the document request made. It states "...the National Archives and Records Administration (NARA) Office of the Inspector General (OIG) has no such records in our files or possession" (Please see Exhibit I)

20. That Plaintiff's attorney received correspondence from the FBI dated October 15, 2010, wherein it was indicated that "Records which may have been responsive to your FOIPA request were destroyed January 1, 1990 through October 1, 1994. Since this material could not be reviewed, it is not known if it was responsive to your request." The letter further stated that "...a search of the Central Records System maintained at FBI headquarters indicated that potentially responsive records have to sent to NARA" and it was indicated that if Plaintiff wished to review those records, a request should be made directly to NARA. (Please see Exhibit J)

21. That Plaintiff's attorney received correspondence from the CIA, dated October 28, 2010. Therein, in replying to Plaintiff's request, that they "were unable to locate any such information or records" and as far as "responsive letters that would reveal a classified connection to the CIA...the CIA can neither confirm nor deny the existence or non-existence of records responsive to your request" (Please see Exhibit K)

22. That Plaintiff received correspondence from the Department of Energy dated January 7, 2011. The letter states "(b)ased on the information you have provided however, we are not able to determine PA systems of records that

may contain information about you." The letter further states that if Plaintiff wishes to conclusive determine whether or not any records are in the DOE's possession, he would need to provide additional information and documentation, including multiple documents validating his identity and a clarification of the documents being requested. (Please see Exhibit L)

23. That the Plaintiff is unaware of any conscious interaction with any of the above agencies, save the Department of Energy, and therefore would be unable to provide any detailed information of same. With regard to files believed to be located at the National Archives, Plaintiff has been informed on numerous occasions by both the defendants and the Court that documents that relate to him are in the possession of the National Archives. (Please see Exhibit M - A copy of the Report and Recommendation of Magistrate Judge Poholoresky, dated April 7, 2006)

24. That Plaintiff has provided any and all information requested by the various Defendants in aid of these requests and has not yet received a sufficient response to any of these requests.

25. That 5 USCA ' 552(a)(6)(A)(i-ii) states:

- (a)6) (A) Each agency, upon any request for records made under paragraph (1), (2) or (3) of this subsection, shall
 - (i) determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal the head of the agency any adverse determination; and

- (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays and legal holidays) after the receipt of such appeal. If on appeal the ~~denial of the request for records is in whole or in part upheld,~~ the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of that subsection

The actions of the defendant were in contravention of the above statutes because the defendant failed to show "unusual circumstances" which would allow it to exceed the limits prescribed by the above cited statutes and defendant exceeded those limits.

26. That, on or about August 22, 1995, Defendant FBI did forward to Plaintiff attorney's office forty-nine (49) pages of records pertaining to Plaintiff. Large portions of these records were redacted and twelve (12) additional pages were withheld entirely. The reasons stated were as follows:

"...in order to protect information which is exempt from disclosure pursuant to the following subsections of Title 5 United State Code, Section 552 and Section 552a

(b)(7) records or information compiled for law enforcement records or information;

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(j)(2) material reporting investigative efforts pertaining to the

enforcement of criminal law including efforts to prevent, control or reduce crime or apprehend criminals, except records of arrest."

Please see Exhibit N - Defendants letter dated August 22, 1995)

27. There had been numerous odd occurrences surrounding Plaintiff's Requests for these documents. Plaintiff had made a concurrent request with regard to Karen F. Kearns, his late wife, for documents that may have pertained to her. This request appears to have been assigned File Number 190-NY-240317 by the Federal Bureau of Investigation, but correspondence directed to Plaintiff with regard to his request for his documents sometimes referred to that file number as well. Correspondence received from the Federal Bureau of Investigation with regard to Mr. Lane's request for his file also referred to File Number 386266 and also referred to "Mark Lane" and "Mark William Lane", as being the name associated with the document requests. With regard to the documents that were not produced, neither Plaintiff nor Plaintiff's attorney had no way of ascertaining if the documents were protected under Title 5, United States Code, and filed suit in United States District Court on May 28, 1996 requesting that either copies of the withheld document be forwarded to Plaintiff's attorney's office or that Plaintiff's attorney be allowed in camera examination of the withheld and redacted documents. Please see Exhibit O -Summons and Civil Complaint filed May 28, 1996, as well as Exhibit P - Copies of correspondence from the Federal Bureau of Investigation dated September 15 1994, March 8, 1995 and

September 30, 1993 as well as an undated cover letter from the Federal Bureau of Investigation with regard to Ms. Kearns.

28. On or about March 4, 1997, Plaintiff's attorney appeared before United States Magistrate Judge Marilyn Go. During this conference, all parties orally agreed to the Court's in camera inspection of the documents in question. On or about April 1, 1997, Assistant U.S. Attorney Vincent Lipari forwarded two "red well" file folders containing Federal Bureau of Investigation files concerning individuals with the name "Mark Lane" to Magistrate Go for her inspection.

29. In addition to these documents, Attorney Lipari also forwarded a letter from James J. Roth, Chief Division counsel of the Federal Bureau of Investigation. This letter also stated that five documents that may pertain to Mr. Lane were

"...not submitted for inspection because of unavailability. Three of these documents could not be located, one had been sent to the National Archives in College Park, Maryland and the last had been removed pursuant to an order of settlement and dismissal dated 10/13/89 in National Lawyers Guild V. Attorney General, 77 Civ. 999 (U.S.D.C., S.D.N.Y.); there is no access before 2025

Please see Exhibit Q - Letter of James J. Roth, dated April 4, 1997.

30. It was also stated that nine (9) pages were not provided to the Magistrate because they were deemed "obscene" by the F.B.I and held

elsewhere. These documents apparently described activities which occurred before 1960 and would not likely refer to the Plaintiff.

31. In July or August of 1999, Magistrate Go examined the two large accordion folders of documents she received and thereafter stated that none of the documents contained within had any information regarding Plaintiff.

32. In the Magistrate's Report of Inspection and Order dated August 12, 1999, Magistrate Go states, with regard to the two documents not released by the F.B.I.:

"As noted in the 1997 Roth Letter, one of the two remaining documents has been ordered sealed by the Court and the other is now at the National Archives. Under FOIA, requested material must qualify as "Agency records" satisfying two requirements; (i) the agency created or obtained the requested materials and (ii) the agency was in control of the requested materials at the time of the FOIA request." Please see Exhibit R- Magistrate's Report.

33. At the time of the filing of the 1996 complaint, Plaintiff's attorney did not know additional records with regard to the Plaintiff had passed from the possession of the F.B.I. to any other agency. Plaintiff's attorney then made requests to the National Archives for copies of these documents. As previously stated, the National Archives have stated that they cannot locate these documents.

34. Magistrate Go was not given the opportunity to review the

documents that had been removed from the case file pursuant to National Lawyers Guild v. Attorney General or the twelve pages that had been withheld under Title 5 United States Code, Section 552 and Section 552a. Again, Plaintiff and Plaintiff's attorney had no way of ascertaining if the documents were protected under Title 5, and have no way of knowing if these documents are indeed withheld due to the reasons stated.

35. The decision in National Lawyers Guild V. Attorney General, 77 Civ. 999 (U.S.D.C., S.D.N.Y.) does not supersede the law as is stated in 5 USCA Section 552 (a)(4)(B)

"On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of agency records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

36. Plaintiff and Plaintiff's attorney demand that the Defendants be made to produce the record in question for in camera review by a Magistrate of

this court who will be able to determine if said document does indeed meet the requirements of the law.

37. That Magistrate Go did not have the opportunity to view the twelve pages withheld to determine if these documents were protected by Title 5. No ruling reflecting a valid injunction prohibiting the disclosure of these records was cited

38. That the continued denial of the Defendants to allow in camera examination of these documents by the Magistrate assigned to this matter has caused my client much undue stress and mental anguish. He believes that the fact that these documents have not been produced for examination is proof of a wide-reaching conspiracy against him. He believes this circumstance may have been prompted by a criminal case against him in Kings County Criminal Court . A copy of the disposition of that case is attached hereto as Exhibit S.

39. That this case should not be barred under *res judicata* as Plaintiff has complied with the instructions of this Court and has still not received a satisfactory response. Plaintiff was instructed that documents related to "Mark Lane" were in the possession of the National Archive, but, despite multiple proper requests, the responses Plaintiff have indicated that no such document can be located.

40. That Plaintiff has exhausted the available administrative processes in that the documents have been requested from various agencies, additional

information and documentation has been provided when requested and appeals have been filed with the respective heads of these agencies.

41. ~~That Plaintiff should not be barred from seeking this relief as the~~ transactional facts, while notionally similar, differ in that Plaintiff was informed, by Order of Magistrate Go, how to seek additional relief, followed those instructions precisely, exhausted the administrative relief at hand and has yet been denied a satisfactory response.

WHEREFORE, Plaintiff prays that this Court:

- (1) Order defendants to make the requested records available to plaintiff;
- (2) That, in the alternative, Defendants make these documents available to the Court for in camera review to determine if these documents refer to my client and if they are in fact protected by the statutes and laws cited;
- (3) That my client be awarded damages in an amount to be determined at trial as compensation for his pain and suffering
- (4) That the Court grant such other, further and different relief as the Court deems proper under the circumstances as set forth in 5 USCA Section 552 Section (a) (4)(E) and 5 USCA Section g(3)(A). Those sections state:
"The Court may assess against the United States reasonable attorney's fees and other such litigation costs reasonably

incurred in any case under this section in which the
complainant has substantially prevailed"

Dated: Brooklyn, New York
March 21, 2013

Respectfully submitted.


Attorney for Plaintiff

To: Federal Bureau of Investigation
New York Office
26 Federal Plaza
New York, New York 10278

Department of Justice
950 Pennsylvania Avenue N.W.
Room B-103
Washington, D.C. 20530

Central Intelligence Agency
Washington, D.C. 20505

National Security Agency
Fort George G. Meade
Maryland 20755-6000

National Archives and Records Administration
8601 Adelphi Road
College Park, Maryland 20740

Central Intelligence Agency
Office of Public Affairs
Washington, D.C. 20505

The Office of Professional Responsibility
950 Pennsylvania Avenue, NW, Suite 3529
Washington, D.C. 20530-0001

The Office of the President of the United States
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Exhibit A

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE : (540) 868-4995/4996/4997

September 30, 2010

Office of Freedom of Information
DARPA
1155 Defense Pentagon
Washington, D.C., 20301-1155

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- Any and all documentation held by/dealing with DARPA regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

I have enclosed a copy of a Power of Attorney executed by Mr. Lane authorizing our office to make this request on his behalf.

If there are any fees for searching for, reviewing, or copying the records, please let me know before you task my request.

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

I thank you for your anticipated cooperation in this matter and ask that you contact my office should you have any questions.

Sincerely,

Peter J. Mollo, Esq.

PJM:ap
enclosure

SEND OUT REPORT

Oct. 01 2010 02:55PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.
1

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit B

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pimollo@earthlink.net

VIA FACSIMILE 301-837-3197

September 30, 2010

Office of the Inspector General
FOIA Request
8601 Adelphi Road, Room 1300
College Park, MD 20740

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- Any and all documentation regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

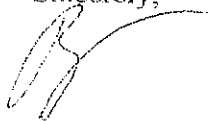
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Sincerely,



Peter J. Mollo, Esq.

PJM:ap
enclosure

SENDING REPORT

Sep. 30 2010 06:15PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

SENDING REPORT

Oct. 01 2010 01:52PM

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YOUR FAX NO. : 7188583035

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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE (301) 837-0293

September 30, 2010

Freedom of Information Act Officer
National Archives
8601 Adelphi Road, Room 3110
College Park, MD 20740-6001

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- Any and all documentation regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

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Sincerely,



Peter J. Mollo, Esq.

PJM:ap
enclosure

Sep. 30 2010 06:06PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

SENDING REPORT

Oct. 01 2010 01:47PM

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YOUR FAX NO. : 7188583035

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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit C

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

September 30, 2010

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

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Sincerely,


Peter J. Mollo, Esq.

PJM:ap
enclosure

Exhibit D

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE 202-418-2826 or 202-418-0521

September 30, 2010

Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

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Sincerely,


Peter J. Mollo, Esq.

PJM:ap
enclosure

RECEIVED

Sep. 30 2010 05:40 PM

YOUR LOGO :

YOUR FAX NO. : 7188583035

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THEN SELECT OFF BY USING '+' OR '-'.
FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

RECEIVED

Sep. 30 2010 05:46PM

YOUR LOGO :

YOUR FAX NO. : 7188583035

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THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit E

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE (703)613-3007

September 30, 2010

Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- * Any and all documentation regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

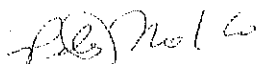
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I thank you for your anticipated cooperation in this matter and ask that you contact my office should you have any questions.

Sincerely,


Peter J. Mollo, Esq.

SENDING REPORT

Sep. 30 2010 05:50PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

SENDING REPORT

Oct. 01 2010 01:36PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit F

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE 443-479-3612

September 30, 2010

National Security Agency
Attn: FOIA/PA Office (DJP4)
9800 Savage Road, Suite 6248
Ft. George G. Meade, MD 20755-6248

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

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Sincerely,

Peter J. Mollo, Esq.

PJM:ap
enclosure

XXXXXXXXXXXX

Sep. 30 2010 05:53PM

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YOUR FAX NO. : 7188583035

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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit G

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE : (540) 868-4995/4996/4997

September 30, 2010

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- * Any and all documentation regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

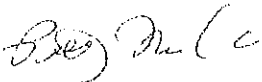
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Sincerely,



Peter J. Mollo, Esq.

PJM:ap
enclosure



Sep. 30 2010 05:51PM

YOUR LOGO :

YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.
FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

SENDING REPORT

Oct. 01 2010 01:24PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
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TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit H

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE (781) 663-0154

September 30, 2010

Northeast Region, Boston
Frederick C. Murphy Federal Center
380 Trapelo Road
Waltham, Massachusetts 02452-639

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- * Any and all documentation regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

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If there are any fees for searching for, reviewing, or copying the records, please let me know before you task my request.

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

I thank you for your anticipated cooperation in this matter and ask that you contact my office should you have any questions.

Sincerely,

Peter J. Mollo, Esq.

PJM:ap
enclosure

SENDING REPORT

Oct. 01 2010 02:02PM

YOUR LOGO :
YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
01	17816630154	Oct. 01 01:59PM	02'39	SND	06	OK

TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

RECEIVED

Sep. 30 2010 06:20:11

YOUR LOGO :
YOUR FAX NO. : 7188583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
01	17816630154	Sep. 30 06:20PM	00'39	SND	01	OK

TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.
FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Peter J. Mollo, Esq.
Attorney and Counselor At Law
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401
pjmollo@earthlink.net

VIA FACSIMILE (301) 837-1864

September 30, 2010

Special Access and FOIA Staff (NWCTF)
8601 Adelphi Road, Room 6350
College Park, MD 20740

Dear Sir or Madam:

Please be advised that I am requesting that your office produce the following documents for my client, MARK WILLIAM LANE:

- Any and all documentation regarding the person named MARK WILLIAM LANE, born November 13, 1955 and whose Social Security Number is 072-50-9580.

I have enclosed a copy of a Power of Attorney executed by Mr. Lane authorizing our office to make this request on his behalf.

If there are any fees for searching for, reviewing, or copying the records, please let me know before you task my request.

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

I thank you for your anticipated cooperation in this matter and ask that you contact my office should you have any questions.

Sincerely,

Peter J. Mollo, Esq.

PJM:ap
enclosure

SENDING REPORT

Sep. 30 2010 06:18PM

YOUR LOGO :

YOUR FAX NO. : 7188583005

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
01	13018371864	Sep. 30 06:18PM	00'31	SND	01	OK

TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

SENDING REPORT

Oct. 01 2010 01:58PM

YOUR LOGO :
YOUR FAX NO. : 718583035

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
01	13018371864	Oct. 01 01:55PM	02'48	SND	07	OK

TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '--'.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

Exhibit I



National Archives and Records Administration

Office of Inspector General

8601 Adelphi Road
College Park, Maryland 20740-6001

October 4, 2010

Peter J. Mollo
266 Smith Street
Brooklyn, NY 11231

Re: Your FOIA request for records related to Mark William Lane (OIG FOIA 10-09)

Mr. Mollo:

This is in response to your letter dated September 30, 2010 requesting "any and all documentation regarding the person named Mark William Lane..." Since you included a signed power of attorney from Mr. Lane authorizing you to request such records, this was processed as both a Freedom of Information Act request and a Privacy Act request. However, the National Archives and Records Administration (NARA) Office of the Inspector General (OIG) has no such records in our files or possession.

The OIG is an independent department tasked by Congress to combat fraud, waste, abuse and mismanagement within NARA. As such, we have no control or authority over records kept and maintained by any other government agency or even any other office at NARA. We only control those records generated within this office alone. I have reviewed our files and we have nothing responsive or related to your request.

Thank you for contacting NARA's OIG.

Sincerely,

John Simms
Counsel to the Inspector General
National Archives and Records Administration

Exhibit J



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

October 15, 2010

MR. PETER J. MOLLO
ATTORNEY AND COUNSELOR AT LAW
266 SMITH STREET
BROOKLYN, NY 11231

FOIPA Request No.: 1154902-000
Subject: LANE, MARK WILLIAM

Dear Mr. Mollo:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request.

In order to respond to our many requests in a timely manner, our focus is to identify responsive records in the automated and manual indices that are indexed as main files. A main index record carries the names of subjects of FBI investigations. Records which may be responsive to your FOIPA request were destroyed January 1, 1990 through October 1, 1994. Since this material could not be reviewed, it is not known if it was responsive to your request. The retention and disposal of records is governed by statute and regulation under the supervision of the National Archives and Records Administration (NARA), Title 44, United States Code, Section 3301 and Title 36, Code of Federal Regulations, Chapter 12, Sub-chapter B, Part 1228. The FBI Records Retention Plan and Disposition Schedules have been approved by the United States District Court for the District of Columbia and are monitored by NARA.

Additionally, a search of the Central Records System maintained at FBI Headquarters indicated that potentially responsive records have been sent to NARA. If you wish to review these potentially responsive records, send your request to NARA at the following address using file number 31-HQ-16452 as a reference:

National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Enclosed for your information is a copy of the FBI File Fact Sheet.

Very truly yours,

A handwritten signature in dark ink, appearing to read "D. Hardy", is written over the typed name.

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosure

Exhibit K

Central Intelligence Agency



Washington, D.C. 20505

October 28, 2010

Mr. Mark W. Lane
c/o Peter J. Mollo, Esq.
Attorney and Counselor at Law
266 Smith Street
Brooklyn, NY 11231

Reference: P-2011-00001

Dear Mr. Lane:

The office of the Information and Privacy Coordinator received your 30 September 2010 letter requesting information pertaining to you. We processed your request under the Privacy Act and the Freedom of Information Act. We assigned your request the reference number above. Please use this number when corresponding so that we can identify it easily.

We searched for CIA-originated responsive records that might reflect an open or otherwise acknowledged Agency affiliation existing through 1 October 2010, the date we accepted your request. We were unable to locate any such information or records.

With respect to responsive records that would reveal a classified connection to the CIA, in accordance with section 3.6(a) of Executive Order 13526, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended and section 102A(i)(1) of the National Security Act of 1947, as amended. Therefore, you may consider this portion of the response a denial of your request pursuant to FOIA exemptions (b)(1) and (b)(3), and PA exemptions (j)(1) and (k)(1). I have enclosed an explanation of these exemptions for your reference and retention.

You have the right to appeal this response within 45 days of the date of this letter. You may address your appeal to the Agency Release Panel, in my care. Please explain the basis of your appeal.

We appreciate your patience while we were processing this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Koch", with a stylized flourish extending to the right.

Scott Koch
Acting Information and Privacy Coordinator

Enclosure

Exhibit L



Department of Energy

Washington, DC 20585

January 7, 2011

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Mark Lane
113 Fox Beach
Staten Island, NY

Re: 11Q-2011-00003-PA

Dear Mr. Lane:

This is in response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. You asked for any and all documentation regarding you.

The Privacy Act (PA), 5 U.S.C. 552a, permits individuals or representatives authorized by them to access their personal information maintained by Federal agencies in accordance with the PA. Since you asked for records that relate to you, processing the request under both the FOIA and the PA would provide you the most access to any responsive records. Based on information you have provided, however, we are not able to determine PA systems of records that may contain information about you.

The DOE regulation that implements the PA states at Title 10, Code of Federal Regulations (CFR), Section 1008.6(b) that, if possible, requests shall specify the title and identifying number of the system of records as listed in the DOE published notices of systems of records and provide any additional information to aid the DOE in responding to the request. To conduct a thorough search under the PA, we need definitive information such as dates and locations of employment with the DOE or any of its predecessor agencies, and dates of any investigation, participation in any program, or other affiliation with the DOE.

In addition, pursuant to 10 CFR 1008.4(b), the DOE requires valid identification of individuals making requests under the PA before information will be released. This ensures that information subject to the PA is released only to the appropriate individual or authorized designee. Requests submitted under the PA also must be signed.

For PA requests submitted by mail, the DOE requires two identifying documents with name and signature. One document must include a current home or business address and date of birth. In lieu of identifying documents, the DOE accepts notarized request letters.

The FOIA provides that a request must reasonably describe the records sought and be made in conformance with the procedural rules of the agency before the request shall, for purposes of the FOIA, be deemed to have been received by the agency. A description of a requested record would be sufficient if it enabled a professional employee, who is familiar with the subject area of the request, to locate the record with a reasonable amount of effort.



2

The DOE regulation that implements the FOIA provides, at 10 CFR 1004.4(c)(1), that a request "must enable the DOE to identify and locate the records sought by a process that is ~~not unreasonably burdensome or disruptive of DOE operations.~~" The regulation further states that, where possible, specific information regarding dates, titles, file designations, offices to be searched, and other information that may help identify the records should be supplied by the requester.

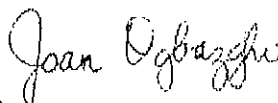
In your letter, you did not reasonably describe the records you seek. You asked for any and all documentation about you. You, however, did not identify any relationship between you and the DOE, its predecessor agencies or its programs. The DOE cannot conduct a search of agency files for responsive documents under the FOIA unless you provide greater specificity to identify the documents you seek, or the files and offices at the DOE that may have information of interest to you.

If you need assistance to reformulate your request to comply with the FOIA or the PA or have questions about providing identification, please contact Ms. Joan Ogbazghi in this office at MA-90/Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585. She also can be contacted on (202) 586-3595. If she does not hear from you or receive a reformulated request and identification documents by January 31, 2011, no further agency action will be taken about the request.

The above referenced number has been assigned to the request and you should refer to it in the response to this office. The systems of records maintained by the DOE under the PA were published in the Federal Register on January 9, 2009, at page 994, and can be accessed at <http://management.energy.gov/documents/FinalPASORNCompilation.18.09.pdf>.

I appreciate the opportunity to assist you.

Sincerely,



for Alexander C. Morris
FOIA Officer
Office of Information Resources

Exhibit M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MARK WILLIAM LANE,

Plaintiff,

JUDGMENT
02-CV- 6555 (ENV)

-against-

THE DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF INVESTIGATION, NATIONAL
ARCHIVES AND RECORDS ADMINISTRATION,
NATIONAL SECURITY AGENCY, CENTRAL
INTELLIGENCE AGENCY, THE UNITED STATES
ARMY, THE OFFICE OF PROFESSIONAL
DISCIPLINE, and THE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

FILED
IN CLERKS OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ JUN 5 2006 ★
P.M. _____
TIME A.M. _____

Defendants.
-----X

An Order of Honorable Eric N. Vitaliano, United States District Judge, having been filed on May 22, 2006, adopting the Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky, dated April 7, 2006, granting the defendants' motion to dismiss the complaint or for summary judgment; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendant; that the Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky is adopted; and that the defendants' motion to dismiss the complaint or for summary judgment is granted.

Dated: Brooklyn, New York
June 02, 2006

ROBERT C. HEINEMANN
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MARK WILLIAM LANE,

Plaintiff,

v.

**REPORT AND
RECOMMENDATION**

THE DEPARTMENT OF JUSTICE and
FEDERAL BUREAU OF INVESTIGATION,
NATIONAL ARCHIVES AND RECORDS
ADMINISTRATION, NATIONAL SECURITY
AGENCY and CENTRAL INTELLIGENCE
AGENCY, THE UNITED STATES ARMY, THE
OFFICE OF PROFESSIONAL DISCIPLINE, and
THE OFFICE OF THE PRESIDENT OF THE
UNITED STATES,

02-CV-6555 (SLT) (VVP)

Defendants.

-----X
POHORELSKY, Magistrate Judge:

Judge Townes has referred to me for a Report and Recommendation, pursuant to Title 28 U.S.C. § 636(b)(1), the defendants' motion to dismiss the plaintiff's complaint which asserts claims under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. For the reasons discussed below, the undersigned recommends that the motion be GRANTED.

BACKGROUND

A. Previous Action Before Judge Block and Magistrate Judge Go

The following facts are presented in the light most favorable to the plaintiff. The instant case (hereinafter "*Lane II*") is essentially a repleader of a case previously before Judge Frederic Block and Magistrate Judge Go. See *Lane v. Federal Bureau of Investigation*, 96 CV 2649 (hereinafter "*Lane I*"). The facts in *Lane I* are briefly recounted here.

In December 1993, believing that he was the subject of an investigation by the Federal Bureau of Investigation, the plaintiff Mark Lane began requesting that the FBI disclose any documents in its possession pertaining to him pursuant to FOIA and the Privacy Act. *Lane I* Compl. ¶ 7 (annexed as Exhibit D to the complaint in *Lane II*).¹ Dissatisfied with the response he received, the plaintiff brought an action against the FBI in May 1996, alleging that it had improperly withheld information and further alleging that the FBI's wrongful conduct "deprive[d] [him] of peace of mind and mental well-being." *Id.* ¶ 16. In his complaint, the plaintiff requested that the court order the FBI to provide him with all of the documents he had requested, including "previously withheld and edited documents." *Id.*, Prayer for Relief ¶ 1-2. Alternatively, the plaintiff requested that his counsel be permitted to examine these documents *in camera*. *Id.*

During a conference held in March 1997, the parties agreed to resolve their dispute by allowing Judge Go to review documents that the FBI had identified pursuant to the plaintiff's FOIA/Privacy Act requests. See Judge Go's 1999 Report of Inspection and Order ("M.J. Go Report") at 2-3 (annexed as Exhibit F to the complaint in *Lane II*); see 5 U.S.C. § 552(a)(4)(B) (permitting *in camera* review). The FBI subsequently provided two redweld folders containing approximately 800 pages of documents for Judge Go to review *in camera*. The FBI also described two groups of documents which it did not provide to Judge Go. First, a group of five documents – identified as Document numbers 160644-132, 100-160644-2070, 100-161993-10516, 100-156924-1A3, and 89-75-Sub A – were not disclosed due to unavailability. In addition, nine

¹ The entire complaint in the instant action, including annexed Exhibits, is attached as Exhibit 1 to the defendants' letter to the court dated August 26, 2003.

pages of documents from one file (identified as File 14-413) were not disclosed because these pages had previously been deemed to be obscene and, thus, were stored outside of the immediate possession of the FBI. M.J. Go Report at 8-12.

After reviewing the documents provided by the FBI, Judge Go found that (1) the documents did not contain any information pertaining to the plaintiff; (2) the majority of the documents contained information pertaining to investigations that involved another individual named "Mark Lane" whose Social Security number did not match the plaintiff's; and, (3) many of the documents concerned activities of the other "Mark Lane" during time periods when the plaintiff would have been a child. *Id.* at 6-7.

As for the first group of five documents not disclosed by the FBI, Judge Go found that three of the documents (Document numbers: 100-160644, 100-160644-2070, and 100-161993-10516) were not only unavailable because they could not be located, but also belonged to files that "clearly concern[ed]" a person other than the plaintiff. *Id.* Of the remaining two documents in that group, Judge Go found that one, Document number 100-156924-1A3, was unavailable because a court had ordered that it be sealed until 2025 pursuant to an order of settlement. *Id.* Finally, Judge Go found that the last of the five undisclosed documents, Document 89-75-Sub A, had been sent to the National Archives in College Park, Maryland in July 1994, and was therefore unavailable because it was no longer in the possession of the FBI. *Id.* at 9-12. Judge Go therefore concluded that the five documents had not been improperly withheld. *Id.* at 13.

As for the nine additional pages of documents in undisclosed File 14-413 which had been labeled obscene, Judge Go found that these documents concerned activities that occurred prior

to 1960, when the plaintiff was a child, and “most likely [did] not refer to the plaintiff.” *Id.* at 9.

Thus, Judge Go concluded that “there is little reason for the plaintiff to continue this case, unless there are legal issues which the plaintiff feels should be addressed through a summary judgment motion.” *Id.* at 15. The plaintiff was given thirty days in which he could object. *Id.* When he failed to do so, Judge Go’s Report of Inspection and Order was adopted in 1999 by Judge Block.

B. The Plaintiff’s Complaint and the Matter Before this Court

In September 2002, the plaintiff filed the instant action (hereinafter *Lane II*) against the FBI urging review of Judge Go’s decision in *Lane I*. In addition to the FBI, the plaintiff brings the instant action against the Department of Justice (“DOJ”), the National Archives and Records Administration (“NARA”), the National Security Agency (“NSA”),² the Central Intelligence Agency (“CIA”), the United States Army (“U.S. Army”), the Office of Professional Discipline, and the Office of the President of the United States (“Office of the President”) (hereinafter “the defendants”). *Lane II* Complaint.

In the complaint in *Lane II*, the plaintiff requests that the court revisit the issue of the undisclosed documents that Judge Go previously concluded were properly withheld from the plaintiff, and that the court order that these documents be made available to the plaintiff or, in the alternative, that the court review the documents *in camera* to determine whether the FBI properly withheld these documents. *Lane II* Complaint ¶¶ 12-20, 22(1)-(3). The plaintiff further contends that continued denial by the defendants to permit *in camera* inspection of these documents has inflicted “much undue stress and mental anguish” on him, and that he believes

² The NSA is no longer a defendant in this case pursuant to a stipulation between the parties in which the plaintiff agreed to drop the suit against the NSA for procedural reasons.

that “the fact that these documents have not been produced for examination is proof of a wide-reaching conspiracy against him.” *Id.* ¶ 20. Although the plaintiff’s complaint in the instant action originally requested that he be compensated by money damages in the amount of \$100,000,000, *id.* ¶ 22 (3), the plaintiff subsequently agreed to dismiss his request for damages and instead seeks only *in camera* review of the previously undisclosed documents. November 2003 Stipulation and Order.

It is unclear exactly which documents the plaintiff wishes to obtain from the FBI for *in camera* review. The complaint specifically refers to the document that was sealed by court order through the year 2025, *Lane II* Compl. ¶ 15, and the document that had been forwarded to the National Archives, *id.* ¶ 16. It also refers to “nine (9) pages . . . not provided to the Magistrate because they were deemed ‘obscene’ by the FBI,” *id.* ¶ 13, but then later confusingly refers to “twelve pages that had been withheld under Title 5 United States Code, Section 552 and Section 552a.” *Id.* ¶ 17.³ In a subsequent letter, the plaintiff’s counsel raises yet further confusion by referring to only five documents. Letter of Peter J. Mollo, Sep. 17, 2003 at 2 (“The main concern of the plaintiff is that the five (5) documents withheld from *in camera* examination either be provided to the plaintiff directly or to the Court for judicial review.”). It is nevertheless clear that reading the complaint as a whole that, as to documents the plaintiff seeks from the FBI, all were covered in the report previously issued by Judge Go.

³ Because Judge Go states that the obscene material consisted of nine pages, see M.J. Go Report at 9, the court accepts that the number of pages deemed to be obscene and thus withheld was nine, not twelve.

~~those agencies.~~

judgment pursuant to Rule 56(c). See Defendants' Notice of Motion.

DISCUSSION

A. Motions to Dismiss Standards

party asserting jurisdiction. See *Shipping Fin. Servs. Corp.*, 140 F.3d at 131. Moreover, if properly

controverted, the plaintiff's factual allegations concerning subject matter jurisdiction do not have to be accepted as true. *Fisher v. F.B.I.*, 94 F. Supp. 2d 213, 215-216 (D. Conn. 2000) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993)). Indeed, when considering a Rule 12(b)(1) motion, a court is not restricted to the pleadings, but may consider affidavits and other materials to resolve the jurisdictional question. See, e.g., *Antares Aircraft L.P. v. Federal Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir. 1991), *vacated on other grounds by*, 5050 U.S. 1215 (1992); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130 (2d Cir. 1976).

When a motion to dismiss is made pursuant to both Rule 12(b)(1) and Rule 12(b)(6), or when a motion for summary judgment made pursuant to Rule 56(c) accompanies a motion to dismiss made pursuant to Rule 12(b)(1), "the court should consider the Rule 12(b)(1) challenge first [because] if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Insurance Guaranty Assn.*, 896 F.2d 674, 678 (2d Cir. 1990) (quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1350, p. 548 (1969)).

B. Freedom of Information Act and Privacy Act

The Freedom of Information Act offers citizens access to records held by federal agencies. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citing 1974 Source Book 38). Among other things, the Act prescribes the types of documents and information that are subject to disclosure, requires agencies to state procedures for obtaining

documents and information, and exempts certain materials from disclosure. See 5 U.S.C. § 552.

If proper requests for documents are denied, FOIA also provides for civil actions to obtain appropriate relief including injunctions. *Id.* § 552(a)(4)(B).

Before filing an action in federal court, however, a plaintiff must exhaust available administrative procedures. Initially, under 5 U.S.C. § 552(a), a party seeking disclosure of material that is not already available to the public must request that information from the agency. Specifically, FOIA requires that an individual seeking personal records (1) reasonably describe the records sought, and (2) comply with any published rules regarding procedures or logistics. See *Dale v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002); see also 5 U.S.C. § 552(a)(4)(B). If any requested information is denied, the denial must then be appealed to the head of the agency. *Ruotolo v. Department of Justice, Tax Div.*, 53 F.3d 4, 8 (2d Cir. 1995); see also *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990); 5 U.S.C. §§ 552(a)(6)(A)(i), (ii). A failure to exhaust administrative remedies provided by the FOIA statute denies a federal district court subject matter jurisdiction over any claim regarding that request. E.g., *Thomas v. Office of the United States Att'y*, 171 F.R.D. 53, 55 (E.D.N.Y. 1997); *Sloman v. United States Dep't of Justice*, 832 F. Supp. 63, 66-67 (S.D.N.Y. 1993) (Mukasey, J.); accord *Hogan v. Huff*, 00 Civ. 6753 (VM), 2002 WL 1359722, at *4 (S.D.N.Y. June 21, 2002); see 5 U.S.C. § 552(a)(6)(A)(i), (4)(B). "Requiring litigants to exhaust their administrative remedies insures that there is no premature interruption of the administrative process and that the administrative agency involved has an opportunity to correct its own errors." *Sloman*, 832 F. Supp. at 65-66 (citing *McKart v. United States*, 395 U.S. 185, 193-94 (1969); *McLaughlin v. NASD*, 733 F. Supp. 694, 696 (S.D.N.Y. 1990)).

The Privacy Act provides individuals with a means of access to government records similar to that of the FOIA. 5 U.S.C. § 552a (2000). Like the FOIA, the Privacy Act also requires that the records be from a government "agency." *Id.* "[I]n order to protect the privacy of individuals identified in information systems maintained by federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies." *Doe v. Chao*, 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974, §§ 2(a)(5), 88 Stat 1896). While the FOIA permits "any person" to seek access to any "agency record," see 5 U.S.C. § 552, the Privacy Act permits only "an individual" to seek access to only his or her own record, and only if that record is maintained by that agency within a "system of records." See 5 U.S.C. § 552a(d)(1). Thus, while FOIA allows broad access to the information that is covered by that Act, the Privacy Act requires government agencies to disclose information only pertaining to the individual who requests it. *Id.*

Like the FOIA, the Privacy Act also requires a requester to exhaust his or her administrative remedies prior to commencing suit in federal court. *Hogan*, 2002 WL 1359722, at *4 (FOIA and Privacy Act) (citing *Tota v. U.S.*, No. 99-CV-0445E (SC), 2000 WL 1160477, at *1 (W.D.N.Y. July 31, 2000)) (in turn citing *Sloman*, 832 F. Supp. at 66)). As a result, where a plaintiff fails to exhaust his or her administrative remedies regarding either a FOIA request or a Privacy Act request and files suit in federal court, the district court lacks subject matter jurisdiction over any such claims. *Hogan*, 2002 WL 1359722, at *4; *Tota*, 2000 WL 1160477, at *1.

C. The Motions to Dismiss

1. FBI

The principle of *res judicata* bars the plaintiff's request for *in camera* review of documents that were not produced by the FBI for Judge Go's inspection in 1999. *Res judicata* prohibits a plaintiff from re-litigating the same or similar claims in a subsequent action if the first action operated as an adjudication upon the merits. *Criales v. American Airlines, Inc.*, 105 F.3d 93, 95 (2d Cir. 1997). "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998); *see also Rivet v. Regions Bank*, 522 U.S. 470, 476 (1998); *Parklane Hosiery co. v. Shore*, 439 U.S. 322, 326 (1979). The Supreme Court has stated that a prior judgment is generally *res judicata* not only as to the matters litigated and decided by a court, but also as to all relevant issues which could have been but were not raised and litigated in the suit. *Richards v. Jefferson County*, 517 U.S. 793, 796 (1996) (citing *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946)). To prove the affirmative defense of *res judicata*, a party must show that: (1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; and, (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 285 (2d Cir. 2000); *see also Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1363 (Fed. Cir. 2000).

The defendant FBI has satisfied its burden of establishing the three elements of the *res judicata* defense. First, there is identity of the parties, namely, Lane and the FBI. Second, there has been an earlier judgment on the merits of the claim (*i.e.*, Judge Go's findings based on a review of the documents produced by the FBI and her conclusions about the documents that were not presented followed by Judge Block's adoption of those findings after the plaintiff had an opportunity to object). Third, the plaintiff's claim in the instant action is based on the same set

of transactional facts as his claim in the first action, to wit, that the FBI should produce FOIA-requested documents relating to the plaintiff. Simply put, the plaintiff's claim against the FBI has already been adjudicated, and the plaintiff failed to take the necessary action to contest that decision. The plaintiff's claim against the FBI in this action therefore should be dismissed.

2. The Remaining Defendants

Likewise, the plaintiff's claims against the remaining defendants, the Office of the President of the United States, the DOJ, the NARA, the CIA, the U.S. Army, and the Office of Professional Discipline should be dismissed because the plaintiff either fails to state a claim upon which relief may be granted, or fails to establish subject matter jurisdiction for his claims.

As the absence of subject matter jurisdiction is the principal basis for dismissal as to the claims against four out of the six remaining defendants,⁴ a brief review of some analytical considerations that inform the court's decision is appropriate. In a FOIA or Privacy Act case, "[o]n a motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction bears the burden of alleging a proper basis for jurisdiction in his pleadings and must support those allegations with 'competent proof' if a party opposing jurisdiction properly challenges those allegations." *Fisher v. FBI*, 94 F. Supp. 2d 213, 216 (D. Conn. 2000) (quoting *Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998) (internal quotations omitted)). Here, although the plaintiff makes a conclusory allegation that he made FOIA requests to the above agencies on November 11, 1999, *Lane II* Complaint ¶ 21, he does not allege that proper request procedures

⁴ As set forth below, the claims against the DOJ, the NARA, the CIA and the U.S. Army should be dismissed for lack of subject matter jurisdiction. The claims against the two other remaining defendants, the Office of the President and the Office of Professional Discipline, should be dismissed for failure to state a claim for relief.

were followed, see *Dale*, 238 F. Supp. 2d at 103 (requiring that an individual seeking personal records reasonably describe the records sought and comply with any published rules regarding procedures or logistics), and indeed provides no information whatsoever about how or where the requests were made. Thus, the plaintiff's assertion that he made valid FOIA requests is but a conclusory statement that is insufficient to defeat a motion to dismiss. See *Zappia*, 215 F.3d at 253; *First Nationwide Bank*, 27 F.3d at 772.

Moreover, the court need not accept the plaintiff's allegation as true because it has been controverted by evidence submitted by the defendant. See e.g., *Cedars-Sinai Med. Ctr.*, 11 F.3d at 1583; *Fisher v. F.B.I.*, 94 F. Supp. 2d at 215-216. Here, as more fully described below, the affidavits of representatives of four out of the six remaining defendants "properly challenge" the plaintiff's asserted basis for subject matter jurisdiction by showing that he either failed to make proper requests or otherwise failed to exhaust his administrative remedies, and the plaintiff has offered no proof to contest the affidavits. Thus, the plaintiff fails to affirmatively establish subject matter jurisdiction as to his claims against those agencies.

i. DOJ

As to the DOJ, the plaintiff's claim should be dismissed because his request to the DOJ did not meet appropriate agency requirements and he did not exhaust his administrative remedies to appeal the denial of the request. The defendants have submitted an affidavit from an attorney in the DOJ's Office of Enforcement Operations in charge of FOIA requests, who certifies that the plaintiff's FOIA and Privacy Act forms do not reflect that he has ever been

prosecuted or even arrested for federal criminal activity.⁵ Declaration of Joseph S. Beck ("Beck Decl.") ¶ 14. Such specificity is required in order for the DOJ to find a record pertaining to a federal criminal offense. *Id.* The plaintiff never appealed the denial of his records request. *Id.* Because the plaintiff's request was insufficient and because he failed to exhaust his administrative remedies, the plaintiff's claim against the DOJ should fail.

ii. NARA

The plaintiff's claim against the NARA fails because the plaintiff failed to submit a FOIA request. Although the plaintiff states that he made FOIA requests to the NARA on November 11, 1999, *Lane II* Complaint ¶ 21, the defendants have submitted an affidavit from a FOIA record keeper at the NARA affirming that the NARA has received no FOIA requests from the plaintiff or his counsel as of August 15, 2003. See Affidavit of Steven D. Tilley ("Tilley Aff.") ¶ 5. A letter submitted by the plaintiff from an archivist at the NARA merely confirms that the plaintiff submitted a request for more information on proper FOIA procedures on July 19, 2001, which was assigned a tracking number NGC01-195. Letter of August 1, 2001 from NARA ("NARA Letter"), *annexed* to Declaration of Margaret Shoenborn ("Shoenborn Decl.") as Def. Exh. C; NARA Letter *also annexed* to Reply Affirmation of Peter J. Mollo ("Mollo Reply Aff.") as Ex. C. The plaintiff provides no evidence to confirm that he ever made an actual FOIA or

⁵ Although the plaintiff provides the court with a copy of his FOIA request to the DOJ, which states that he was "arrest[ed for] drug trafficking (cocaine)" in Brooklyn, New York in approximately 1991, see Reply Affirmation of Peter Mollo ("Mollo Reply Aff."), Ex. A, the plaintiff did not indicate on the request that this offense was a federal one for which the DOJ would have a record. (As a federal agency, the DOJ does not keep records of state crimes; rather, it keeps records of federal crimes.) See Beck Decl. Likewise, the document provided by the plaintiff verifying that he was sentenced by the Suffolk County Supreme Court to a term of six months in Suffolk County jail for attempted grand larceny, see Mollo Reply Aff. Ex. B, is entirely a state matter and therefore of no relevance to a federal criminal records request from the DOJ.

Privacy Act request to the NARA. Because the plaintiff does not show that he even took the first step in the administrative process, the plaintiff fails to affirmatively establish that the court has subject matter jurisdiction over this claim.

iii. CIA

As to the CIA, the plaintiff's claim should be dismissed because he did not properly make a FOIA or Privacy Act request to the CIA and did not exhaust his administrative remedies. The defendants have submitted an affidavit from the Information and Privacy Coordinator for the CIA, who affirms that she received a deficient Privacy Act request on July 13, 1999 from the plaintiff which could not be processed because it was missing the plaintiff's place of birth. Declaration of Kathryn I. Dyer ¶¶ 4, 6. According to Dyer, when the plaintiff failed to respond to the agency's request that he provide this information, they closed his file. *Id.* ¶ 7. As to the plaintiff's FOIA request concerning Karen F. Kearns, or Karen F. Kearns, the agency conducted a search and found no responsive records pertaining to Ms. Kearns, *id.* ¶ 14; CIA Letter to Plaintiff of Sept. 28, 1999, and the plaintiff failed to appeal this finding to higher authorities. *Id.* ¶ 15. Because the evidence outside the pleadings indicates that the plaintiff failed to exhaust his administrative remedies, the plaintiff's complaint against the defendant CIA should be dismissed for lack of subject matter jurisdiction.

iv. U.S. Army

As to the U.S. Army, the plaintiff's claim should be dismissed because the plaintiff made a deficient FOIA and Privacy Act request and never followed through in the administrative process. The defendants have submitted an affidavit from Lieutenant Colonel Gregory B. Coe, the individual in charge of FOIA and Privacy Act records for the U.S. Army, who affirms that he

received a request from the plaintiff for records pertaining to him and Karen Kearns on July 13, 1999. Declaration of Lieutenant Colonel Gregory B. Coe ¶ 5. By letter incorrectly dated February 19, 1999, the Army responded to the plaintiff's July 13, 1999 letter, directing the plaintiff to produce information establishing his and Ms. Kearns' affiliation with the Army. *Id.* According to Lt. Col. Cole, the plaintiff never provided such information. *Id.* ¶ 6. Although the plaintiff's counsel contends that he never received the Army's responsive letter, that assertion alone does not suffice to provide subject matter jurisdiction because the plaintiff has not established that he met the prerequisites for a proper request for information under 32 C.F.R. § 505.2. The plaintiff's failure to do so prevents this court from exercising subject matter jurisdiction over his claim.⁶

v. Office of the President

The Office of the President of the United States is not an agency subject to requests under the FOIA. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971 (1980). "The Conference Report for the 1974 FOIA Amendments indicates that 'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Id.* (citing H.R. Conf. Rep. No. 93- 1380, p. 15 (1974), reprinted in Sourcebook II, p. 232). Thus, the plaintiff's claim against the Office of the President should be dismissed for failure to state a claim upon which relief may be granted.

vi. Office of Professional Discipline

⁶ Plaintiff's counsel also asserts that "[s]ubsequent requests made directly by the Plaintiff [to the Army] were not answered." Mollo Reply Aff. ¶ 2. This assertion is unsupported by any documentation, and is insufficient in any event because counsel has no personal knowledge of the facts asserted.

The plaintiff's claim against the Office of Professional Discipline fails because this office does not exist as a federal agency and, thus, the plaintiff fails to state a claim upon which relief may be granted. To the extent that the plaintiff meant to bring this claim against the Office of Professional Responsibility, which is a division of the DOJ, the plaintiff's claim against a subsidiary office of the DOJ should fail for the same reasons as the plaintiff's claim against the DOJ, *viz.*, the court lacks subject matter jurisdiction over the claim because the evidence outside the pleadings indicates that the plaintiff failed to make proper FOIA requests to the DOJ. Likewise, although the Army apparently accepted service of the summons and complaint on behalf of the Office of Professional Discipline, it has no such office. Thus, the plaintiff's claim against the Office of Professional Discipline should be dismissed.

Because the plaintiff has either failed to state a claim upon which relief can be granted or failed to affirmatively establish that the court has subject matter jurisdiction over his FOIA and Privacy Act claims against the defendants the DOJ, the NARA, the CIA, the U.S. Army, the Office of the President, and the Office of Professional Discipline or Responsibility, his claims should be dismissed.

D. The Motion for Summary Judgment

Even if it were not proper to dismiss the plaintiff's claims against the DOJ, the CIA, the U.S. Army, and the NARA under Rule 12(b)(1), the plaintiff's claims against those agencies are appropriately resolved on summary judgment because, on the basis of the undisputed facts, no properly requested documents have been withheld by any of them.

A motion for summary judgment will be granted when there is no material issue of fact to be decided and the undisputed facts warrant judgment for the moving party as a matter of law.

See Fed. R. Civ. P. 56(c); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Institute for Shipboard Educ. v. Cigna Worldwide Inc. Co.*, 22 F.3d 414, 418 (2d Cir. 1994). If a reasonable jury could return a verdict for the non-movant, then a material issue of fact remains in contention and the motion must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The materiality of the facts is determined by the substantive law governing the claims. *Id.*

The burden of proving that no material issue of fact remains in dispute rests on the movant. *Celotex*, 477 U.S. at 322. Once a motion has been made, however, the non-moving party must set forth specific factual allegations to avoid summary judgment. *Kuriso v. Providence and Worcester R.R. Co.*, 68 F.3d 591, 594 (2d Cir.1995); *Fahle v. Braslow*, 913 F. Supp. 145, 149 (E.D.N.Y. 1996), *aff'd*, 111 F.3d 123 (2d Cir. 1997) (citations omitted). Conclusory, *ipse dixit* assertions will not defeat a summary judgment motion. *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990). Although the non-moving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment, Rule 56(c) and (e) provide that the non-moving party cannot rest on the pleadings but must set forth specific facts in the affidavits, depositions, answers to interrogatories, or admissions on file showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *United States v. Rem*, 38 F.3d 634, 643 (2d Cir. 1994). Any ambiguities and all inferences must be drawn in favor of the non-movant. *Cigna Worldwide*, 22 F.3d at 418; *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990).

In support of their motion for summary judgment under the FOIA and the Privacy Act, defendant agencies may submit affidavits from records administrators certifying that they have

conducted searches for requested documents; however, those affidavits must be reasonably detailed and must not be conclusory. *Hogan*, 2002 WL 1359722, at *4 (citing *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). Affidavits submitted by defendant agencies are accorded a presumption of good faith, *id.* at *4 (citing *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)), and, if adequate on their face, will serve to support a motion for summary judgment unless a plaintiff-requester provides evidence of bad faith. *Id.*

To survive summary judgment on claim alleging a violation of the FOIA, a plaintiff must provide evidence that an agency has (1) "improperly" (2) "withheld" (3) "agency records." *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. at 150. Two requirements must be satisfied for requested documents to qualify as "agency records," and thus be subject to a request under FOIA: (1) an agency must either "create or obtain" the requested materials, and (2) the agency must be in control of the document at the time the FOIA request is made. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 479 (2d Cir. 1999) (citing *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989); *Reporters Comm. for Freedom of Press*, 445 U.S. at 137-38 (in order for an agency to produce a particular document that is sought by a FOIA requester, it must have possession or control of that document)). The fact that an agency has failed to produce a particular document in the course of its search does not render the search inadequate. *Grand Cent. P'ship, Inc.*, 166 F.3d at 489; *see also Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995); *Maynard v. CIA*, 986 F.2d 547, 564 (1st Cir. 1993). An agency's search need not be perfect, but rather need only be reasonable. *Grand Cent. P'ship, Inc.*, 166 F.3d at 489; *see also Steinberg v. United States DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). Speculation

that not yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them. *Sheridan v. Dep't of the Navy*, 2001 WL 498117 (citing *Safecard Servs., Inc.*, 926 F.2d at 1201).

To survive summary judgment on claim alleging a violation of the Privacy Act, a plaintiff must provide evidence that (1) that a request for records was made; (2) that the request was denied; and (3) that such denial or failure to act was improper under the Privacy Act. 5 U.S.C. §§ 552a(d)(1), (g)(1)(B), (g)(3)(A). Under both the FOIA and the Privacy Act, if a person does not make a valid request, the agency cannot be said to have "withheld" documents. See *Thomas v. Office of the U.S. Atty for the Eastern Dist. of New York*, 928 F. Supp. at 248, n. 5 (citing *Reporters Comm. for Freedom of Press*, 445 U.S. at 150). To "withhold" documents is to refuse to give documents within the agency's control to the requestor or to deny a valid request. See *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 149-50. Where documents do not exist, there can be no "withholding." See 5 U.S.C. 552(a)(3) (requests can be made only for "identifiable records"); see also *Nolen v. Rumsfeld*, 535 F.2d 890, 891 (5th Cir. 1976) ("The Act compels only disclosure of existing records."), cert. denied, 429 U.S. 1104, reh'g denied, 431 U.S. 909 (1977); *Exxon Corp. v. F.T.C.*, 384 F. Supp. 755, 760 (D.D.C. 1974), remanded by, 527 F.2d 1386 (D.C. Cir. 1976) (table).

Here, summary judgment should be granted in favor of the DOJ because the defendants provide a detailed and non-conclusory affidavit that indicates there is no genuine factual dispute as to the DOJ. DOJ records analyst Joseph S. Beck affirms that he conducted a search and found no records pertaining to the plaintiff except for the plaintiff's FOIA request and the DOJ's response. Beck Decl. ¶ 13. Beck certifies that the absence of any DOJ records relating to the

plaintiff is not surprising because his request form does not indicate that he was ever arrested or even prosecuted for federal criminal activity. *Id.* ¶ 14. Although the plaintiff submits his FOIA request to the DOJ in an attempt to contradict Beck's statement, the text of the plaintiff's request supports Beck's assertion that the plaintiff was never prosecuted for a federal crime. *Mollo Reply Aff.* The plaintiff merely indicates that he was arrested in Brooklyn, New York for drug trafficking/cocaine, but does not indicate whether he was ever prosecuted for this crime or whether it was even handled by federal authorities. *Id.* Thus, the plaintiff fails to establish a genuine issue of fact that any DOJ documents concerning federal crimes exist. Likewise, although the plaintiff submits his sentencing record from Suffolk County Supreme Court for pleading guilty to grand larceny, *Mollo Reply Aff.*, the plaintiff's state-court conviction and sentence does not establish a genuine issue of fact that any DOJ documents concerning federal crimes exist. Thus, summary judgment is appropriate as to the DOJ.

Likewise, summary judgment should be granted in favor of the CIA because it submits uncontested evidence that the documents in question do not exist. In response to the instant action, CIA record keeper Katherine I. Dyer conducted a search on June 23, 2003 and again on July 1, 2003 and found no CIA records pertaining to the plaintiff or Karen Kearn or Karen Kearns. *Dyer Decl.* The plaintiff submits nothing in response to create a genuine factual issue that these records exist (such as proof of the plaintiff's employment as a diplomat or the like). Thus, summary judgment is appropriate as to the CIA.

In addition, summary judgment should be granted in favor of the U.S. Army because it provides uncontested evidence that the documents in question do not exist. U.S. Army FOIA and Privacy Act records analyst Lt. Col. Coe certifies that he conducted a search of Army

records and found no records pertaining to the plaintiff. Coe Decl. ¶ 7. The plaintiff provides no evidence to the contrary and provides no proof that he was ever affiliated with the Army in any way. Thus, summary judgment is appropriate as to the U.S. Army.

Finally, summary judgment should be granted as to the NARA because the plaintiff never made a records request to the NARA and, thus, fails to present a genuine factual issue for a jury that any documents have been improperly withheld. The plaintiff's argument that he submitted a records request to the NARA in July 2001 that went unanswered is not supported by the evidence in the record. See Mollo Reply Aff. Although the plaintiff offers a letter from the NARA written August 2001 that purports to confirm receipt of the plaintiff's records request to the NARA in July 2001 that was assigned a tracking number, a closer look at the NARA's letter reveals that it merely confirms receipt of plaintiff's counsel's request for information as to *how to file* a proper request with the NARA. NARA Letter, Shoenborn Decl., Def. Exh. C; Mollo Reply Aff. Plaintiff's counsel's request for the proper procedures, rather than an actual records request, was assigned the tracking number. NARA Letter. In fact, a declaration by an NARA record keeper affirms that, as of 2003, the plaintiff never submitted a records request to the NARA. Tilley Aff. ¶ 5. Thus, summary judgment is appropriate as to the NARA.

In sum, the plaintiff provides no evidence from which a reasonable juror could find that any documents were improperly withheld by or even exist with the DOJ, the CIA, the U.S. Army, or the NARA. Therefore, summary judgment should be granted in favor of these defendants.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss the plaintiff's complaint should be GRANTED as to all of the defendants. Specifically, as to the FBI, the Office of the President, and the Office of Professional Discipline, the defendants' motion to dismiss should be GRANTED under Rule 12(b)(6) for failure to state a claim for relief. As to the DOJ, the NARA, the CIA, and the U.S. Army the defendants' motion to dismiss should be GRANTED under Rule 12(b)(1) for lack of subject matter jurisdiction, or in the alternative, if a claim against any of those agencies is not dismissed for want of subject matter jurisdiction, the defendants' motion for summary judgment on the claim should be GRANTED under Rule 56(c).

* * * * *

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court with a copy to the undersigned within 10 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298 (2d Cir.), cert. denied, 113 S. Ct. 825 (1992); *Small v. Secretary of Health and Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Viktor V. Pohorelsky
VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
April 7, 2006

Exhibit N



U.S. Department of Justice

envelope and the letter should be clearly marked "Freedom of Information Appeal". Please cite the name of the office of the Federal Bureau of Investigation directed.

In addition, please note that your client has been advised by this office that this matter was forwarded to New York, New York 10278

File No. 190-NY-240317. Your client has August 22, 1995 with this office of Information/Privacy Acts (FOIPA) release. It will not be necessary for him to visit an FBI office to view these records, as he requested in a letter received by this office August 15, 1995.

Peter J. Mollo, Esq.
266 Smith Street
Brooklyn, NY 11231

Sincerely,

JAMES E. ROTH
Re: Mark William Lane Charge
FOIPA Request

By: J. E. ROTH
JAMES E. ROTH
Chief Division Counsel

Dear Mr. Mollo:

Reference is made to your letter to this office dated August 15, 1995.

Your client's (Mark William Lane) Freedom of Information/Privacy Acts (FOIPA) file, 190-NY-240317, has been processed. Enclosed are 49 pages of copied material. Excisions have been made on this material and 12 pages have been withheld in their entirety in order to protect information which is exempt from disclosure pursuant to the following subsections of Title 5, United States Code, Section 552 and 552A:

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information;

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals, except records of arrest.

You may submit an appeal from this denial by writing to the Co-Director, Office of Information and Privacy, Room 7238 Main, United States Department of Justice, Washington, D.C. 20530, within thirty days from receipt of this letter. The

U.S. Department of Justice
envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal". Please cite the name of the office to which your original request was directed.

In addition, please note that your client has been advised by this office that this material has been forwarded to you.

New York, New York 10279
Finally, your client has been advised that with this Freedom of Information/Privacy Acts (FOIPA) release, it will not be necessary for him to visit an FBI office to view these documents, as he requested in a letter received by this office August 21, 1995.

Sincerely,

JAMES K. KALLSTROM
Assistant Director in Charge

By: *9/m*
JAMES J. ROTH
Chief Division Counsel

Your letter to this office dated [redacted] regarding your request for information compiled for New York State (NY) file, 100-NY-240117, has been received. The information requested has been reviewed and 12 pages have been withheld from release. The information which is exempt from release is the following subsections of Title 3, Section 87(2)(b), (c) and (d):

1. Information compiled for New York State to the extent that the production of such information would constitute an unwarranted invasion of personal privacy;
2. Information which, if disclosed, would identify confidential sources of information;
3. Information which, if disclosed, would reveal the identity of confidential informants;
4. Information which, if disclosed, would reveal the identity of confidential informants;
5. Information which, if disclosed, would reveal the identity of confidential informants;
6. Information which, if disclosed, would reveal the identity of confidential informants;
7. Information which, if disclosed, would reveal the identity of confidential informants;
8. Information which, if disclosed, would reveal the identity of confidential informants;
9. Information which, if disclosed, would reveal the identity of confidential informants;
10. Information which, if disclosed, would reveal the identity of confidential informants;

If you wish to appeal from this denial by writing to the Director, Freedom of Information and Privacy, Room 7238, Department of Justice, Washington, D.C. 20530, please include a copy of this letter. The receipt of this letter is the

Exhibit O

file copy 3/2

United States District Court

Eastern

DISTRICT OF

New York

Mark William Lane

SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

*The Dept of Justice and
The Federal Bureau of Investigation*

CV

96

2649

BLOCK J.

GO, M.

TO: (Name and Address of Defendant)

*Dept of Justice - FBI
26 Federal Plaza
NY NY 10278*

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

*Peter J. Mollo
266 Smith St
Brooklyn NY 11231*

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

ROBERT C. HEINEMANN

MAY 28 1996

CLERK

DATE

BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MARK WILLIAM LANE,

Index No.:

Plaintiff

SUMMONS

- against -

THE DEPARTMENT OF JUSTICE and
THE FEDERAL BUREAU OF
INVESTIGATION,

Defendant.
-----X

CV 96

2649
BLOCK, J.

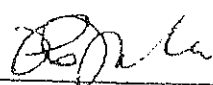
GO, M.

To the above named defendants:

You are hereby summoned and required to submit to defendant's attorney your answering papers on this motion. Defendant shall serve an Answer or otherwise plead to any Complaint made under SS2 (a)(4)(B) within ^{lit}thirty (30) days after service upon the defendant of the pleading on who such Complaint is made unless the Court otherwise directs for good cause shown under SS2(a)(4)(c). In case of your failure to submit answering papers, a default judgement will be taken against you by default for the relief demanded in the notice of motion.

The basis of venue designated is the place of business of the defendant.

Dated: March 26, 1996


Peter J. Mollo, Esq.
Attorney for Plaintiff
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MARK WILLIAM LANE,

Index No.:

Plaintiff

- against

CV 96

CIV.

2649

CIVIL COMPLAINT

BLOCKED

THE FEDERAL BUREAU OF
INVESTIGATION,

GO, M.

Defendant.
-----X

1. This Court has jurisdiction of the action under the Freedom of Information and Privacy Act, Sec. (a) (4) (B). 5 USCA Sec. 552.

2. Jurisdiction is proper under 552 Sec. (a) (4) (B) because Plaintiff, Mark William Lane, maintains a residence in Staten Island, New York.

3. Venue is proper under FRCP because Plaintiff is located in Eastern District.

PARTIES

4. Plaintiff is a private citizen living in Staten Island, New York.

5. PLAINTIFF believes and alleges, that Defendant, FEDERAL BUREAU OF INVESTIGATION, (hereinafter "DEFENDANT") is a subdivision of the United States Department of Justice, and maintains an office at 26 Federal Plaza, New York, New York 10278.

6. PLAINTIFF is, and, at all times relevant to the matters alleged in this complaint was attempting to obtain a copy of all documents held by the DEFENDANT regarding

PLAINTIFF.

7. Beginning approximately in December of 1993, PLAINTIFF began requesting copies of all information regarding himself from DEFENDANT under the provisions of the Freedom of Information and Privacy Act. PLAINTIFF's requests in this area were met with silence or denials that the information existed. On two separate occasions, PLAINTIFF received letters from DEFENDANT denying the existence of any documents pertaining to him (see Exhibit A).

8. In November of 1994, PLAINTIFF retained Peter J. Mollo, Esq. (hereafter "PLAINTIFF'S ATTORNEY"), in an attempt to expedite the release of the aforementioned documents. PLAINTIFF'S ATTORNEY also had difficulty obtaining these records.

9. DEFENDANTS requested more information about PLAINTIFF. Finally, DEFENDANT admitted that files exist about PLAINTIFF. However, it said that there would be a delay in forwarding these documents (See Exhibit B).

10. 5 USCA Sec. 552(a)(6)(A)(i-ii) states:

"(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --

(i) determine within ten days, (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays and legal holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection."

The actions of DEFENDANT are in contravention of the above statutes because the defendant failed to show "unusual circumstances" which would allow it to exceed the limits prescribed by the above cited statutes and defendant exceeded those limits.

11. DEFENDANT finally forwarded the documents to PLAINTIFF'S ATTORNEY'S OFFICE on or about August 22, 1995. These documents total forty-nine (49) pages of records about PLAINTIFF. Large portions of these documents were redacted and twelve (12) pages were withheld entirely. The reasons stated were as follows:

"... in order to protect information which is exempt from disclosure pursuant to the following subsections of Title 5, United States Code, Section 552 and Section 552a:

(b)(7) records or information compiled for law enforcement records or information;

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals, except records of arrest."

(See Exhibit C: Defendant's letter dated August 31, 1994)

12. PLAINTIFF and PLAINTIFF'S ATTORNEY have no way of ascertaining if the documents are protected under Title 5, United States Code, Sections 552 and 552a. DEFENDANT has the burden of proving that the documents are protected. DEFENDANTS explanation is not proof. DEFENDANT merely recites the statute. As such, DEFENDANT has failed to carry its burden and DEFENDANT must either disclose or violate the Freedom of Information Act. The PLAINTIFF demands that the DEFENDANT

prove this point.

13. In such a case [Where the agency records are improperly withheld from Complainant] the Court shall determine the matter de novo and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section and the burden is on the agency to sustain its action. As stated in 5 USCA Sec 552a (g)(3)(A):

"In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action."

14. DEFENDANT should not have the discretion to unilaterally withhold the requested documents. Not permitting PLAINTIFF or PLAINTIFF'S ATTORNEY to review the withheld documents and the excised portions of the documents impedes PLAINTIFF's right to a fair determination of the issues. As set forth in 5 USCA Section 552(a)(4)(B):

"On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

15. In the alternative, if DEFENDANT can show that an

innocent party's right to privacy would be compromised, PLAINTIFF is entitled to a sealed in camera examination of the documents that the agency is seeking to withhold.

16. The natural, probable and foreseeable result of the DEFENDANT's wrongful conduct has been and will continue to deprive PLAINTIFF of peace of mind and mental well-being. It will add to his severe mental anguish and interfere with his career and personal life.

CLAIM FOR RELIEF FROM WRONGFUL WITHHOLDING OF
INFORMATION

17. PLAINTIFF realleges each and every allegation set forth in Paragraph 1 through 13, inclusive and incorporate them herein by this reference.

18. By its actions, DEFENDANT infringed and will infringe on PLAINTIFF's right to Freedom of Information.

19. PLAINTIFF is entitled to recover from DEFENDANT the withheld documents and the redacted portions of the documents he has already received, because DEFENDANT failed to comply with the procedure in 5 USCA Sec 552 for disclosing information:

"(d) Access to records - Each agency that maintains a system of records shall - (1) upon request by any individual, permit him, and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portions thereof in a form comprehensible to him, except that the agency may cause the individual to furnish a written start.."
5 USCA Sec 552a

Here, Plaintiff is an individual who has requested access to his records and information contained in the Federal Bureau of Investigation's system. As such, he has a right to review the

record.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF prays for judgement against the DEFENDANT as follows:

1. That this court order the DEFENDANT to forward copies of all documents requested by PLAINTIFF and PLAINTIFF's attorney to the PLAINTIFF and PLAINTIFF's ATTORNEY. These include previously withheld and edited documents requested by PLAINTIFF.

2. That, in the alternative, PLAINTIFF and PLAINTIFF's ATTORNEY be allowed a sealed in camera examination of all documents the agency is seeking to withhold from him.

3. That the Court grant such other, further and different relief as the Court deems proper under the circumstances as set forth in 5 USCA Section 552 Section (a) (4) (E) and 5 USCA Section 552 Section g(3) (A). Those sections state:

"The Court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."


MARK WILLIAM LANE

Dated: Brooklyn, New York
January 17, 1996

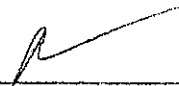

PETER J. MOLLO, ESQ.
Attorney for Plaintiff
266 Smith Street
Brooklyn, New York 11231
(718) 858-3401

Exhibit P



Federal Bureau of Investigation

Washington, D. C. 20535

MR MARK WILLIAM LANE
682 FOREST AVENUE
STATEN ISLAND, NY 10310

SEP 15 1994

Request No. 386266

Re: Self

Dear Requester:

A search of the automated indices to the central records system files maintained at FBI Headquarters located no records responsive to your FOIPA request. The automated indices is an index to all records created since January 1, 1958, in security, applicant, and administrative matters, as well as to all records created since January 1, 1973, in criminal matters.

If you have reason to believe that records responsive to your request were created prior to the above dates, please resubmit your request and provide any information which would be helpful to us in conducting an additional search. This completes the processing of your request at this time.

Although no record responsive to your request was located, we are required to inform you that you are entitled to file an administrative appeal if you so desire. Appeals should be directed in writing to the Co-Director, Office of Information and Privacy, Room 7238 Main, United States Department of Justice, Washington, D.C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the Freedom of Information-Privacy Acts (FOIPA) request number assigned to your request so that it may be easily identified.

Sincerely yours,

J. Kevin O'Brien, Chief
Freedom of Information-
Privacy Acts Section
Information Resources Division



Federal Bureau of Investigation

In Reply, Please Refer to
File No. 190-NY-240317

26 Federal Plaza
New York, New York 10278
March 8, 1995

Peter J. Mollo, Esq.
266 Smith Street
Brooklyn, NY 11231

Re: Mark William Lane
FOIPA Request

Dear Mr. Mollo:

In response to your Freedom of Information/Privacy Acts (FOIPA) request on behalf of your client, dated November 15, 1994, a search of the indices to the Central Records System as maintained by the New York Office of the Federal Bureau of Investigation (FBI) revealed material that might possibly be responsive to your request. However, this information is presently unavailable and has been placed on special locate. Upon retrieval, should it be responsive to your request, it will be processed pursuant to the FOIPA and you will be advised of the results.

No other records responsive to your request were located.

Sincerely yours,

WILLIAM A. GAVIN
Deputy Assistant
Director in Charge

By: *James J. Roth*
JAMES J. ROTH
Principal Legal Advisor

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

In Reply, Please Refer to
File No. 190-NY-240317

~~CONFIDENTIAL~~
26 Federal Plaza
New York, N. Y., 10278
September 30, 1993

Mark William Lane
c/o Catherine Lane
682 Forest Avenue
Staten Island, N. Y., 10310

Dear Mr. Lane:

I am writing in further response to your Freedom of Information/Privacy Acts (FOIPA) request.

In response to your FOIPA request, a search of the indices to the Central Records System as maintained in the New York Office (NYO) of the Federal Bureau of Investigation (FBI) revealed one (1) reference that might possibly be responsive to your request. However, this reference is presently unavailable and has been placed on special locate. Upon retrieval, should it be responsive to your request, it will be processed pursuant to the FOIPA and you will be advised of the results.

No other records responsive to your request were located.

Although no records responsive to your request were located, we are required to inform you that you are entitled to file an administrative appeal if you so desire. Appeals should be directed in writing to the Assistant Attorney General, Office of Legal Policy, (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C., 20530, within thirty (30) days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal". Please cite the name of the office to which your original request was directed.

Sincerely yours,

James M. Fox
Assistant Director in Charge

By: *JJR/pnw*
James J. Roth
Principal Legal Advisor



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

26 Federal Plaza
New York, New York 10278

Peter J. Mollo, Esq.
266 Smith Street
Brooklyn, NY 11231

Subject of Request: Karen F. Kearn
190-NY-240317

Dear Requester:

Enclosed are copies of documents from FBI records. Excisions have been made to protect information exempt from disclosure pursuant to Title 5, United States Code, Section 552 (Freedom of Information Act) and/or Section 552a (Privacy Act). In addition, where excisions were made, the appropriate exempting subsections have been cited opposite the deletions. Where pages have been withheld in their entirety, a deleted page information sheet has been substituted showing the reasons or basis for the deletion. The subsections cited for withholding information from the enclosed documents are marked below:

Section 552

<input checked="" type="checkbox"/> (b) (1)	<input type="checkbox"/> (b) (7) (A)
<input checked="" type="checkbox"/> (b) (2)	<input type="checkbox"/> (b) (7) (B)
<input checked="" type="checkbox"/> (b) (3) _____	<input checked="" type="checkbox"/> (b) (7) (C)
_____	<input checked="" type="checkbox"/> (b) (7) (D)
_____	<input checked="" type="checkbox"/> (b) (7) (E)
<input type="checkbox"/> (b) (4)	<input type="checkbox"/> (b) (7) (F)
<input type="checkbox"/> (b) (5)	<input type="checkbox"/> (b) (8)
<input type="checkbox"/> (b) (6)	<input type="checkbox"/> (b) (9)

Section 552a

<input type="checkbox"/> (d) (5)
<input type="checkbox"/> (j) (2)
<input type="checkbox"/> (k) (1)
<input type="checkbox"/> (k) (2)
<input type="checkbox"/> (k) (3)
<input type="checkbox"/> (k) (4)
<input type="checkbox"/> (k) (5)
<input type="checkbox"/> (k) (6)
<input type="checkbox"/> (k) (7)

(See Form OPCA-16a, enclosed, for an explanation of these exemptions.)

Pursuant to your request, 97 page(s) were reviewed, and 95 page(s) are being released.

During the review of material pertinent to the subject of your request, documents were located which

☐ originated with another Government agency(ies).

These documents were referred to that agency(ies) for review and direct response to you.

☐ contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).

☒ If you desire, you may appeal any denials contained herein. Appeals should be directed in writing to the Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001 within 60 days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

☒ The enclosed material is from the main investigative file(s) in which the subject of your request was the subject of the investigation. Only those portions of the file responsive to your request have been processed.

☐ See additional information which follows.

Sincerely,

LOUIS D. SCHILIRO
Assistant Director in Charge

By:

James J. Roth
JAMES J. ROTH
Chief Division Counsel

Enclosures (2)

Exhibit Q



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

26 Federal Plaza
New York, New York 10278
April 4, 1997

United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Mark William Lane V. Department of Justice and the
FBI
Civil No. 96-CV-2649

Dear your Honor:

At the Court's request, the FBI is providing copies of documents for an in-camera review by the Court. This review is the result of Mr. Lane filing a civil action after being advised by the New York Office (NYO) of the FBI that there were no records responsive to his Freedom of Information and Privacy Act request (FOIPA) for information on himself.

The NYO reviewed documents regarding the names "Mark William Lane" and "Mark Lane" to determine if there were records responsive to Mr. Lane's request. The Court will be reviewing documents retrieved as a result of those two names being searched in the NYO Central Records System (CRS) indices.

There are five documents which are not available to be reviewed by the Court. These documents are not available for the following reasons:

1. Document 100-160644-132 (indexed in September of 1970), which could not be located;
2. Document 100-160644-2070 (indexed in October of 1972), which could not be located;
3. Document 100-161993-10516 (indexed in August of 1970), which could not be located;
4. Document 100-156924-1A3, which has been removed pursuant to an order of settlement and dismissal dated 10/13/89 in National Lawyers Guild v. Attorney General, 77 Civ. 999 (U.S.D.C., S.D.N.Y.); there is no access before 2025.

Exhibit R

5. Document 89-75-Sub A, which was sent to the National Archives, College Park, Maryland on 7/7/94.

Upon review of other available documents that are located in files 100-160644 and 100-161993, the Court will be able to determine that the "Mark Lane" in the three documents which could not be located is not identical to the plaintiff Lane in this civil action.

It is requested that the Court, upon completion of its review, please return the enclosed documents to the NYO of the FBI.

If there are any questions regarding this matter, please contact Assistant Division Counsel (ADC) Darlene D. Ragins, at the above address or at (212) 384-2609.

Sincerely,

James K. Kallstrom
Assistant Director In Charge

By:


James J. Roth
Chief Division Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MARK WILLIAM LANE,

Plaintiff,

-- against --

REPORT OF INSPECTION
AND ORDER

CV 96-2649 (FB) (MDG)

THE DEPARTMENT OF JUSTICE and
THE FEDERAL BUREAU OF INVESTIGATION,

Defendants.
-----X

GO, United States Magistrate Judge:

Plaintiff, Mark William Lane, brings this action against the Federal Bureau of Investigation ("F.B.I.") alleging improper withholding of information in response to his requests pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Plaintiff also alleges that the F.B.I. failed to respond to plaintiff's FOIA request within the statutory time limits and failed to show "unusual circumstances" pursuant to 5 U.S.C.A. § 552(a)(6)(B) to warrant a delay in its response to plaintiff. (Compl. at ¶ 10).

At an initial conference held on March 4, 1997, plaintiff's counsel advised that his client's primary concern was that the government was incorrect in determining that none of the records held by the FBI concerning "Mark Lane" pertained to plaintiff. Thus, the parties orally agreed to having the Court make an in

camera inspection of all the records held by the FBI as a way of resolving this case short of formal motion. See 5 U.S.C.A. § 552 (A)(4)(B) (~~permitting in camera inspection~~). As a result, the parties have neither filed a formal motion or a written consent pursuant to 28 U.S.C. § 636(c). This report sets forth the results of this inspection, with the recommendation that this action be dismissed, subject to the right of the plaintiff to file a formal motion should he wish to do so.

BACKGROUND

Procedural Background

Plaintiff commenced this action on May 28, 1996 claiming violations of FOIA and the Privacy Act. He alleges that in December 1993, he began requesting copies of all information pertaining to him from the F.B.I. because he believed he had been "under investigation by the F.B.I. and others." (Compl. at ¶ 7). Plaintiff further alleges that his requests for information were met with silence or denials that the information existed, and that his attorney also had difficulty obtaining these records. (Compl. at ¶¶ 7, 8). He also complains that "defendant's wrongful conduct" has deprived "plaintiff of peace of mind and mental well-being[,] ... add[ed] to his severe mental anguish and interfere[d] with his career and personal life." (Compl. at ¶ 16).

When the parties agreed at the initial conference to an in camera inspection by the Court, I directed plaintiff to provide

the Court with pertinent information concerning his personal background in order to be better able to determine whether any of the withheld documents pertained to plaintiff. Peter Mollo, plaintiff's counsel, then sent a letter dated March 10, 1997 ("March 1997 Let.") describing a large category of documents which his client wished to review. The documents he sought included records and documents pertaining to: any investigation of plaintiff by any Federal, State and/or City police agencies; any criminal record plaintiff may have; plaintiff's Social Security, disability and unemployment benefits; "any mention of Mr. Lane in the files of any government agency," including the F.B.I., the Central Intelligence Agency and the United States Army; Mr. Lane's of employment and subsequent dismissal by the New York City Department of Corrections; "[a]ny mention of Gary Cohen and his possible status as an informant for any city, state or federal agency"; "[a]ny mention of a 'Fotis', residing at 31-18 Newtown Avenue, Queens, New York;" plaintiff's previous requests for information under the Freedom of Information Act"; of "any Executive orders" concerning with plaintiff's file; "any biologically masked implant and/or medical procedure performed Mr. Lane;" and any mention of "Karen Kearns or Claudia Norris." (March 1997 Let., at 1, 2).

In response to a court request for further information, Mr. Mollo sent a second letter dated February 23, 1998 ("Feb. 1998 Let.") with an attachment from plaintiff containing background

information about his residences, education and employment. In these submissions, plaintiff states that he was born on November 13, 1955 and has lived at various addresses on Staten Island. He has also lived in Illinois, Queens and Virginia. He was trained as a plumber and worked as a plumber's helper and mechanic in various agencies and departments of the City of New York.

(Compl. at ¶ 4; Feb. 1998 Let. at 2)

By letter dated April 10, 1997, Assistant U.S. Attorney Vincent Lipari forwarded two redwells containing F.B.I. files concerning individuals with the name "Mark Lane." As set forth in an accompanying letter dated April 4, 1997 from James J. Roth, Chief Division Counsel of the F.B.I. ("Roth Letter"), the documents consisted of all the documents reviewed by the F.B.I. in responding to plaintiff's FOIA requests. Mr. Roth also described five documents which were not submitted for inspection because of unavailability. Id. Assistant U.S. Attorney Lipari also submitted a declaration of Darlene Ragins, Supervisory Special Agent of the F.B.I. assigned to the Legal Unit of the New York Field Office, sworn to on April 4, 1997 ("Ragins Decl.") describing the processing of plaintiff's FOIA requests.

In a letter dated April 12, 1999, Mr. Lane enclosed three documents and requested explanations for them. One document was a judgment of conviction and sentence entered on November 24, 1985 by a Criminal Term of the Supreme Court, Hauppauge, Suffolk County, New York, against a "Mark W. Lane" born on November 13,

1955. He felt that this document is "proof that the Justice Department has my D-Felony Conviction on record" and requested copies of other paperwork concerning him. He also sought clarification regarding a notation "duplicate serials destroyed" on two U.S. Department of Justice documents he received concerning the processing of his FOIA request.

Plaintiff's FOIA Request

The information pertinent to the processing of plaintiff's FOIA requests by the F.B.I. is set forth in the Ragins Decl. and the exhibits attached thereto, particularly Exhibit E which contains defendant's final response to plaintiff's requests.

Plaintiff made his first FOIA request by letter dated August 20, 1993 addressed to the New York office of the F.B.I. ("NYO") requesting all information concerning himself. (Ragins Decl. at ¶ 4 and Ex. A). By letter dated August 27, 1993, James Roth, then Principal Legal Adviser of the NYO, acknowledged receipt of plaintiff's request and stated that although the NYO would attempt to expedite its search, there would be some delay "due to the volume of requests being handled by this office..." (Ragins Decl. at ¶ 5 and Ex. B).

In a second letter dated September 30, 1993, Mr. Roth advised plaintiff that the NYO found no documents responsive to plaintiff's request, except one possible reference to plaintiff's request not then available. Mr. Roth further stated that the NYO had placed a "special locate" for these records and would process

them upon retrieval. (Ragins Decl. at 6 and Ex. C; Compl. at ¶ 9). The letter also advised plaintiff that "[a]lthough no records responsive to your request were located, we are required to inform you that you are entitled to file an administrative appeal" to the Office of Information and Privacy, U.S. Department of Justice. Id. By letter dated July 13, 1994, Mr. Roth sent copies of his September 30, 1993 and August 25, 1993 letters to plaintiff in response to plaintiff's telephone request. Id.

Plaintiff apparently filed an appeal with the Office of Information and Privacy. In a note dated July 24, 1994, plaintiff claimed that he is "presently under investigation with the most illegal equipment ever used" and that his head had been turned into a radio transciever [sic] of some sort." Id.

By letter dated September 27, 1994, Richard L. Huff, Co-Director of the Office of Information and Privacy of the U.S. Department of Justice affirmed the F.B.I.'s determination that the NYO had no other records responsive to plaintiff's request. (Ragins Decl. at ¶ 7 and Ex. D). Mr. Huff also advised that he would close the appealed file, since there had been no denial of access and that plaintiff had a right to seek judicial review. Id.

Peter Mollo, Esq., plaintiff's attorney, then made a second FOIA request by letter dated November 15, 1994. (Ragins Decl. at Ex. E). The NYO replied by letters dated December 1, 1994 and December 21, 1994 stating that plaintiff's waiver of personal

privacy authorizing release of information to Mr. Mollo was not properly notarized.¹ Id. By letter dated March 8, 1995 addressed to Mr. Mollo, the NYO stated that a search revealed that there might be material responsive to plaintiff's request, which was placed on "special locate" since it was "presently unavailable." Id. Plaintiff and his counsel apparently then called the NYO in June and July, 1994 for copies of plaintiff's original FOIA request. Plaintiff also sent a letter sworn to on July 10, 1995 with the same request and stating that his original FOIA request contained his statements about an investigation by New York City police "based on false accusations." Mr. Roth responded by letters dated June 22, 1995 and July 24, 1995.

After three searches of its central records, James Roth, who had become Chief Division Counsel of the NYO, forwarded by letter dated August 22, 1995 to Mr. Mollo a total of forty-nine (49) pages of F.B.I. documents pertaining to plaintiff's request. (Compl. at ¶ 11; Ragins Decl. at ¶¶ 8, 10 and Ex. E). These documents consisted of papers concerning plaintiff's FOIA request, including correspondence between the F.B.I. and plaintiff or his attorney and forms used by the F.B.I. in processing plaintiff's request. (Ragins Decl. at ¶ 8 and Ex. E). However, as noted by Mr. Roth in the letter, the NYO redacted certain portions of the documents and withheld 12 pages of a

¹ Although the waiver authorized release of the information to Mr. Mollo, the waiver bore only the notarial stamp of Mr. Mollo and did not contain a jurat.

document which he claimed were exempt from disclosure under Title 5, United States Code, Section 552 and 552A.² Id.

In Camera Inspection

The F.B.I. provided two red wells containing approximately 800 pages of documents for in camera inspection. After reviewing every document, I find that none of the documents contain any information concerning plaintiff.

The majority of the documents were contained in six F.B.I. files in connection with investigations which involved an individual named "Mark Lane." The "Mark Lane" mentioned in these files and the other F.B.I. documents inspected appear to pertain to the same individual, but a person who clearly was much older than plaintiff and possessed a different social security number. The "Mark Lane" described worked in professions other than plumbing, lived in many cities other than ones where plaintiff has lived, and engaged in activities in states and countries

² Citing section 552 of FOIA and 552A of the Privacy Act, Mr. Roth claimed in the letter that the materials were exempt from disclosure because they were:

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information;

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; 5 U.S.C.A. § 552(b)(7)(C);

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals, except records of arrest.

never mentioned by plaintiff. In fact, none of the documents inspected mention any person, organization, address or activity listed by plaintiff in his submissions concerning his background and topics of concern. Moreover, all the F.B.I. documents predated November 22, 1986 and many concerned activities of a "Mark Lane" during time periods in which plaintiff would have been a child.

Besides the five documents not submitted due to unavailability described in the Roth Letter, the F.B.I. also did not provide for in camera review nine (9) pages of document from file number 14-413 because they had been deemed "obscene" by the F.B.I. and held elsewhere. See document 14-413-4 at page 3. Since the other documents in file 14-413 which describe activities occurring before 1960, the nine withheld pages designated "obscene" most likely do not refer to plaintiff.

DISCUSSION

Congress enacted the Freedom of Information Act "to promote honest and open government and to assure the existence of an informed citizenry to hold the governors accountable to the governed." Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 478 (2d Cir. 1999) (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 2327 (1978)). FOIA is to be construed broadly to provide information to the public in accordance with its purposes as it was intended to advance "a general philosophy of full agency disclosure." Grand Central, 166

F.3d at 478 (quoting Federal Labor Relations Auth. v. United States Dep't of Veterans Affairs, 958 F.2d 503, 508 (2d Cir. 1992)). Thus, courts must narrowly construe the nine enumerated exemptions to the general rule of disclosure, 5 U.S.C. § 552(b), and resolve doubts in favor of disclosure. Federal Labor Relations Auth., 958 F.2d at 508.

The court reviewing an agency's decision to withhold or redact records requested under FOIA must conduct a de novo review in a light most favorable to the requester of information. See 5 U.S.C. § 552(a)(4)(B); Massey v. F.B.I., 3 F.3d 620, 622 (2d Cir. 1993). The agency also bears the burden of establishing that it conducted an adequate search that failed to produce requested records. See 5 U.S.C. § 552(a)(4)(B); EPA v. Mink, 410 U.S. 73, 79, 93 S. Ct. 827 (1973); Katzman v. Central Intelligence Agency, 903 F. Supp. 424 (E.D.N.Y. 1995).

Since I conclude from my in camera inspection that none of the F.B.I records pertain to plaintiff, there is little issue that the F.B.I. properly withheld the documents submitted the documents for inspection. Exemption 7(C) of FOIA protects from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C). The documents inspected clearly were compiled for law enforcement purposes in connection with efforts to prevent criminal activity. Many of these documents contained

observations regarding the social and political activities of many other individuals, besides the other "Mark Lane," and sometimes involved very personal and private matters.³ The privacy concerns here clearly outweigh any generalized interest that plaintiff may have to inspect documents concern persons having the same name.⁴ See U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 756, 109 S. Ct. 1468 (1989) (privacy interests under broader under exemption 7(C)).

Defendant did not produce five documents for inspection due to unavailability for the following reasons: documents numbered 100-160644-132 (indexed in September of 1970), 100-160644-2070 (indexed in October of 1972) and 100-161993-10516 (indexed in August of 1970) could not be located; document 100-156924-1A3, was removed pursuant to an order of settlement which bars access before 2025; and document 89-75-Sub A, was sent to the National Archives, College Park, Maryland on July 7, 1994. (April 4, 1997 Roth Letter at 1-2).

Mr. Roth states in his cover letter that the three documents which could not be located (documents numbered 100-160644-132, 100-

³ For example, there was a reference to sexual activity in which "Mark Lane" engaged in a document from file #14-413, followed by nine (9) pages of redactions deemed "obscene" by the F.B.I. and held elsewhere. See page 3 in file #14-413-4.

Suffice to say, since the activities described in file #14-413-4 all occurred before 1960, when plaintiff was five or younger, it is highly unlikely that they pertain to him.

⁴ All references to "Mark Lane" in the documents did not contain any middle name, let alone plaintiff's.

160644-2070 and 100-161993-10516) are missing from files pertaining to another "Mark Lane." Id. I agree from examination of the two pertinent files (#100-160644-2070 and #100-161993-10516) that the other documents therein clearly concern a different "Mark Lane," for many of the reasons discussed earlier. Also, since these three missing documents were indexed in 1970 or 1972, it is unlikely that they would pertain to the plaintiff since the activities noted in the documents occurred before the time of indexing when plaintiff was an adolescent or younger.

As noted in the 1997 Roth Letter, one of the two remaining documents has been ordered sealed by the Court and the other is now at the National Archives. Under FOIA, requested material must qualify as "agency records" satisfying two requirements: (i) the agency created or obtained the requested materials, and (ii) the agency was "in control of the requested materials" at the time of the FOIA request. Grand Central, 166 F.3d at 479 (quoting Tax Analysts, 492 U.S. at 144-45, 109 S. Ct. at 2848); see also Forsam v. Harris, 445 U.S. 169, 182, 100 S. Ct. 977, 985, 63 L. Ed. 2d 293 (1980) (defining "create or obtain"). Since the two other unavailable records are no longer within the control of the F.B.I., they are not "agency records" subject to disclosure under FOIA. See Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 157, 100 S. Ct. 960, 968 (1980) (an agency "has neither the custody or control necessary to enable it to withhold" a document which had been removed from the agency's possession prior to the

filing of the FOIA request). Therefore, defendant has not improperly withheld the five documents it has not produced for in camera inspection.

Likewise, the F.B.I. has no obligation under FOIA to disclose documents that it does not possess, but which may be kept by the local police departments or other federal agencies, such as the C.I.A. Plaintiff is simply wrong in assuming that the F.B.I. has a file on every person convicted of a crime or that it would have documents about plaintiff because of his state court conviction for attempted grand larceny in 1985.

As set forth more fully in the Ragins Declaration, a Paralegal Specialist ("PLS") in the NYO directed a search of the NYO's primary records repository, the central records system ("CRS"), on the name of "Mark William Lane." (Ragins Decl. at ¶ 10). The search included an automated and manual search of the NYO's general indexes and cross references. Id. at ¶ 12.⁵

Under FOIA, an agency has a duty to conduct a reasonable search for records responsive to an information request. Master v. Federal Bureau of Investigation, 926 F. Supp. 193 (D.D.C. 1996); (citing Ogelsby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir.

⁵ The General Indices consists of two separate categories, "main" and "cross" references. A "main" index reference carries the name of an individual, organization, activity, or the like which is the primary "main" subject of the file maintained in the system. (Ragins Decl. at ¶ 15). A "cross" index reference contains only a mention or reference to a particular individual, organization, activity, or the like that is located in the body of a communication in a file pertaining to another "main" subject in the system. Id.

1990)). An agency must show that it "made a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested." Id. The agency may establish the thoroughness of the agency's search through affidavits which are ordinarily "accorded a presumption of good faith." Carney v. U.S. Dept. of Justice, 19 F.3d 807, 812 (2d Cir. 1996) (quoting Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Other courts have found that a search of the F.B.I. indexes to be sufficient. See e.g., Campbell v. U.S. Dept. of Justice, No. 89-CV-3016 (RMU), 1996 WL 554511, at *4 (D.D.C. Sept. 19, 1996) (holding that the F.B.I.'s declaration explaining that it searched its "main" and "see" indexes and cross-referenced them was sufficient).

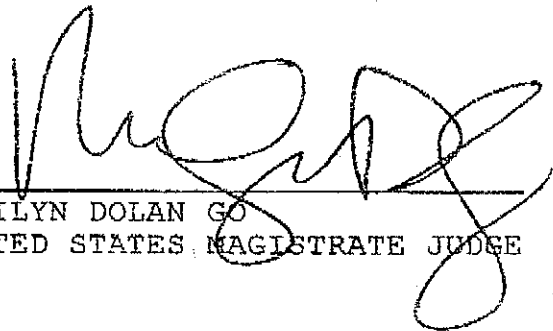
Defendant's search yielded a large quantity of documents, most of which were not about plaintiff but someone with the same name. The few documents about plaintiff consisted of the plaintiff's prior FOIA requests. Id. at ¶ 12 and Ex. E. Thus, after a careful and thorough review of the documents provided to me for an in camera inspection, I find that the F.B.I. has not improperly withheld their agency documents, since none of the withheld which were available for inspection pertained to plaintiff.

CONCLUSION

For the foregoing reasons, there is little reason for plaintiff to continue this case, unless there are legal issues which plaintiff feels should be addressed through a summary judgment motion. If plaintiff seeks to do so, he must file a pre-motion letter with Judge Block by September 9, 1999. If he does not do so, the Court will assume he no longer wishes to pursue this action.

SO ORDERED.

Dated: Brooklyn, New York
August 10, 1999



MARILYN DOLAN GO
UNITED STATES MAGISTRATE JUDGE

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August 10, 1999

TELECOPIER TRANSMISSION COVER SHEET

TO: Peter J. Mollo, Esq.
FROM: Marilyn Dolan Go, U.S.M.J.
RE: CV 96-2649

Total number of pages, including this cover sheet: 16

MESSAGE: Endorsed Order enclosed.

